No. 8411.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

/ b

In the Matter of
JOSEPH H. GRANDE,
Bankrupt.

Joseph H. Grande,
Appellant,

vs.

Arizona Wax Paper Company and State Produce Exchange,
Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

Appellees herein are certain objecting creditors to the petition for discharge presented by the bankrupt herein. They have filed objections to the bankrupt's (appellant herein) petition for discharge and, though there were two objections, they were referred to the same Master and heard at one time. The specifications in each objection are practically identical. The record does not disclose that the appellant objected to the sufficiency of the charges

therein made before hearing on the merits, and it appears from the Master's report that hearing was had upon each of the objections. [Tr. of Rec. pp. 32-44.]

Some confusion may exist on our part in that the notice of appeal appearing on page 62 of the transcript of record indicates that the present appeal was from the order and decree of September 15, 1936, which, of course, is the order overruling the objections of the bankrupt to the report of the Referee and Special Master and denying the petition for discharge.

Appellant, however, on page 7 of his brief, states, after a recital of the matters which purport to constitute the statement of facts, that, upon the foregoing facts, he appeals and "bases his right to have the rulings of the Referee in Bankruptcy, Special Master, and the rulings of the United States District Court reversed and set aside and the bankrupt discharged", thus, apparently, laboring under the task of reexamining the entire issue whatever may be its judicial status.

Though it is possible that appellant's brief is confusing only to us, we have felt it beneficial to assume the liberty of stating the facts as chronologically as possible, having due regard to their actual proof and existence, to determine the possible questions that can be considered, and we respectfully set forth the following:

Statement of Facts.

In October of 1934, the bankrupt herein filed his petition for voluntary adjudication as bankrupt, which was granted. His trustee was elected, who proceeded with the administration of the estate. Thereafter, in the course of such proceedings, the trustee filed a petition against the bankrupt, a corporation conducted as Grande-California, Inc., and other persons, seeking a turnover order from the bankruptcy court as to all of the property and assets in the name of Grande-California, Inc., claiming that said corporation was but an *alter ego* of the bankrupt and that it was organized for the purpose of concealing the assets of the bankrupt. A hearing was had thereon and a turnover order was issued under date of February 4th, 1935, in the form of findings and order. This sets forth the fault found by the Referee with the petition for such turnover order, as originally filed, and that a new petition has been filed and a hearing had upon stipulation of the parties, and the Referee then made findings, conclusions and an order, from which it appears that, on March 2, 1934, the particular corporation was organized and there was transferred to it by the bankrupt, without consideration, automobiles, cash, merchandise, leases and contracts. That, at the time, the bankrupt had many and extensive debts and he was being pressed for the payment thereof, and that the transfer was for the purpose of preventing the creditors from collecting their accounts against him and also for the purpose of hindering, delaying and defrauding his creditors.

The Referee then found that the corporation was caused to come into being and to exist solely for the purpose of permitting the bankrupt to do business without being

hindered by his creditors and for the purpose of permitting him to retain possession of his property under the name of the corporation.

The Referee then concluded that the bankrupt was the sole owner of the capital stock of the corporation and all of its assets and that the property should have been turned over to the trustee in bankruptcy by the bankrupt at the time that he was adjudicated upon his voluntary petition. [Tr. pp. 3-7.]

Under the rules of the United States District Court in and for the Southern District of California, where the petition was filed, Rule 84 provides as follows:

> "Rule 84.—Review of Referee's Orders.
>
> A petition for a review of an order made by a Referee as provided in General Order No. XXVII of the General Orders in Bankruptcy must be filed with the Referee within ten days from the date of notice of such order. The Referee may require to be paid in advance in addition to the costs referred to in Rule 81, his actual expense in making a summary of the evidence.
>
> For good cause shown, the Referee may at any time within said period of ten days, extend the time an additional thirty days within which a petition for review may be filed."

On or about the 21st day of February, 1935, a motion and order to show cause was made and obtained by the bankrupt, which, upon hearing thereof, was considered as a motion to be relieved of default and to have the order reviewed. The order to show cause was returnable on

February 25, 1935. Thereby the bankrupt sought to be relieved of default in seeking a review of the order.

Thereupon, the Court denied the relief sought by the bankrupt and particularly stated, in the course of the written opinion, that, considering the merits of the case, it was not apparent that injustice would result to the bankrupt by the enforcement of the order and that there was no conflict as to the fact that the corporate entity was but a vehicle used by the bankrupt for the conduct of his business, and the corporation was his *alter ego*. The Court, in concluding the opinion, also expressed itself to the effect that the showing as to mistake of counsel was not sufficient to justify the relief sought by the bankrupt and that, assuming the omission to take the review within the time provided by the rule was excusable, there was not sufficient showing of error therein. [Tr. pp. 16-17.]

It is clear, therefore, that in denying the motion or petition of the bankrupt, the Court considered, not only the propriety of relieving the bankrupt of default, but also the possibility of disturbing the conclusions of the Referee upon review.

Exception was noted to the ruling of the Court. The ruling was made on February 27, 1935, and no appeal therefrom was had and the order was not in anywise modified or changed.

Thereafter, on September 23, 1935, the Referee in Bankruptcy (and being the same Referee that made the order of February 4, 1935, above referred to) issued to

the bankrupt a certificate of compliance, appearing on page 18 of the transcript.

Thereafter, on the 8th day of October, 1935, the bankrupt presented his petition for discharge.

Under the rule of the District Court in which the bankruptcy proceedings were pending, it is provided, in part, as follows:

> "Rule 78.—Discharge, Composition and Certificate of Compliance on Discharge.
>
> "The petition for a discharge, or for a confirmation of a composition, must be filed with the clerk of the court. The petitioner shall file with his petition (or within such further time as the court shall allow) a statement of the Referee to whom the case shall have been referred, showing that the bankrupt has in all things conformed to the requirements of the Bankruptcy Act and has committed none of the offenses and done none of the things prohibited by said Act. It shall be the duty of the Referee to furnish such statement upon demand of the bankrupt. If the Referee cannot make a statement favorable to the bankrupt, he shall, nevertheless, inform the court in the statement required to be furnished, specifically as to the facts upon which his refusal is based so that the court may take such action as it may deem necessary before allowing the discharge.
>
> "No order to show cause why a discharge should not be granted in a bankruptcy matter shall be placed upon the calendar for hearing until the Referee's cer-

tificate of compliance or the Referee's statement of facts hereinbefore provided to be made, and the affidavit of publication and proof of mailing notices to creditors shall have been on file in the clerk's office for five days prior to the date of hearing.

"All applications for discharge shall be heard on the first Monday of each month."

Thereupon, on the 2nd day of December, 1935, the appellees herein filed their appearances and objections to the bankrupt's discharge. The objections particularly state that, within the statutory period, the bankrupt transferred and concealed property with the intent to hinder, delay and defraud his creditors; this was followed by the allegation of the transfer and concealment of the assets of the bankrupt to the corporation, and was based extensively on the findings and order of the Referee dated February 4th, 1935, and a certified copy of the order was attached to the objections and was made a part thereof; that the order had become final. The objections were filed by the objecting creditors (appellees herein) and both were filed on the 2nd day of December, 1935, were filed in sequence, but were referred to the same Master on the 2nd day of December, 1935, and a hearing was had thereon.

The Special Master found in accordance with the allegations of the objections to the discharge of the bankrupt, and found that the findings and order of February 4, 1935, have become final; that the findings and order were

a part of the file of the proceedings had in the bankruptcy proceedings of the appellant herein. Then as to the other matters alleged in the objections (that is, that within four months of the bankruptcy, the bankrupt transferred property and assets, of the value of more than one dollar ($1.00), to his wife, particularly during the month of September, and prior to the 10th day of October, 1934, for the purpose of delaying and defrauding his creditors, and that he has transferred and concealed and permitted to be transferred and concealed a portion of his property, consisting of cash on hand and in bank, and that he transferred it to his wife and concealed it in her name), the Special Master found that, the adjudication took place on the 10th of October, 1934; that on the preceding day, the bankrupt gave and transferred to his wife $1395.00 and, on the day of the bankruptcy, he gave his wife $750.00; that, when the bankrupt was questioned regarding these transfers to his wife, he gave no explanation of his act and claimed that he did not remember the occurrence. The Master, further, shows unsatisfactory testimony of the bankrupt during bankruptcy proceedings and cites inconsistencies in the written testimony adduced. No showing, of course, has been made that the testimony of the bankrupt was in anywise improperly before the Court.

The Special Master then concludes as to the status of the objecting creditor; the finality of the judgment of February 4, 1935; that each objecting creditor is a creditor of the bankrupt and was a creditor at the time of

the filing of the petition and can maintain and present the objections; also that the acts took place within the period specified by paragraph 14-b (4) of the Bankruptcy Act. The Special Master recommended the denial of the petition for discharge. [Tr. pp. 32-44.]

The trustee did not appear in the proceeding had.

Thereupon, a document was filed by the bankrupt entitled "Appeal of Bankrupt—Exceptions to Report of Special Master", the first specification appertaining primarily to the appearance of counsel for the trustee in the proceedings before the Special Master as attorney for the objecting creditors. These purported objections to the Master's report contain this language, as it appears on page 47 of the transcript:

> "On the report of the Referee as Special Master, a trial was had of the issues raised by the bankrupt petition of discharge and objections thereto filed by the objecting creditor etc. Evidence both oral and documentary was presented and submitted to the Special Master; the evidence being closed the cause was submitted to the Special Master for his report, findings and determination. The Referee, as Special Master, reports as follows: * * *."

Hearings were had on the objections to the Master's Report and, on the 15th day of September, 1936, the Court held that the objections of the bankrupt to the report of the Referee and Special Master be overruled and that his petition for discharge be denied. [Tr. p. 61.]

Statement of Points Apparently Urged by Appellant and Argument Thereon.

I.

It would appear from the appellant's statement of points involved in the appeal, and set forth on page 21, that the turnover order of February 4, 1935, is not final and apparently can be examined in this proceeding. Even if it were so (and this in view of the authority which we cite below is even unthinkable), we cannot see what is to be used as a criterion of reexamination of this order, as upon its very face it is shown that it is the result of evidence adduced before the Referee, the evidence has not been brought up, and no application for permission to appeal therefrom has been made to the Circuit Court of Appeals.

The sole basis of exception to the order is that appellant rather unfairly takes one portion thereof (on page 10 of the brief), wherein the order specifically shows that no person invested any money in the corporation, and adopts this, so to say, as his text, without giving heed to what precedes and follows, and that this statement of the Referee is but an exemplification of the fact that the corporation was a creature of the bankrupt for the benefit of the bankrupt and as a vehicle of fraud to be used against the creditors of the bankrupt.

The virtual review of February 27, 1935, by the District Judge is dismissed by appellant with the simple statement that it was simply a determination that the appellant

was too late to secure the relief sought, though the opinion states that the nature of the corporate entity and its purpose was not questioned, and further states that a consideration of the matters that have come before the Court would not justify the Court to disturb the order of the Referee.

II.

Then the appellant apparently endeavors to find solace in the certificate of compliance issued to the bankrupt on September 23, 1935. It is evident, however, under the rule of the District Court in which the cause was pending, that a certificate was necessary in order to permit the bankrupt to file a petition for discharge. It apparently is an *ex parte* order which cannot in anywise disturb an order that has become final and conclusive as, given its greatest scope, it afforded the appellant the privilege to put into issue his right to a discharge and to ask the Court for a ruling thereon. This he did, and objections thereto were made and sustained.

III.

Then the appellant urges that one of the creditors filed the objections at ten o'clock in the morning and the other at 4:30 o'clock in the afternoon, all, however, of the same day upon which the hearing was to be had. Wherein this in anywise conflicts with General Order No. XXXII is rather difficult to understand. Apparently no objection has been made thereto by the appellant before the reference or at time of hearing of the reference, and the refer-

ence proceeded without the benefit of having presented, either to the Master or to the Court, the objections thus discovered by the appellant. The appearance and objection, according to the position of the appellant himself, were on the day specified by General Order No. XXXII.

IV.

The next point urged by the appellant is some deficiency in the specifications of objection of the appellee Arizona Wax Paper Company, without clearly stating in what manner it so fails.

The record does not disclose any attack upon it as a pleading, and, of course, it is but a familiar rule of pleading that pleadings are always aided by the judgment rendered by the Court after hearing. It is significant that the hearing had before the Special Master produced the result prayed for in the objections and that the action of the Special Master, upon review, has been sustained by the District Judge. The presumptions arising therefrom shall be discussed later.

V.

The next point of attack, apparently, is that the bankrupt in some manner is affected by the appearance of the attorney, who was also the attorney for the trustee, as attorney for the objecting creditors.

It is evident from the record, however, that the trustee is not a party to the proceeding. Thus, the question as to whether the trustee has been authorized to object to the discharge at a meeting of creditors, as provided by

the act, does not in anywise enter into the consideration. Wherein, therefore, an undue or improper burden has been placed on the appellant, we cannot say.

To dispose of any questions raised or involved by this appeal, we present these points to the Court:

1. The Order of February 4, 1935, Is a Final Order, Cannot Be Attacked Collaterally, and Is Not in Anywise Affected by the Subsequent Certificate of September 23, 1935.

2. Objections of the Appellee Creditors Have Been Filed in Pursuance to General Order No. XXXII.

3. The Order of February 4, 1935, Establishes the Presence of One of the Grounds Specified by Section 14 of the Bankruptcy Act Under Which the Discharge Must Be Denied.

4. Prior Determination of Concealment Is Conclusive in All Subsequent Proceedings.

5. It Was Within the Inherent Power of the Court to Take Judicial Notice of the Existence of the Order of February 4, 1935.

6. Findings of a Special Master or Referee Approved by the District Court Are Conclusive of the Question of Fact and Will Not Be Disturbed Except in Case of Gross Error.

1. **The Order of February 4, 1935, Is a Final Order, Cannot Be Attacked Collaterally, and Is Not in Anywise Affected by the Subsequent Certificate of September 23, 1935.**

Throughout appellant's brief, statements can be found that the order of February 4, 1935, is not a final order. We are not given the benefit of any reason therefor. Looking at the pronouncement of the District Judge of February 27, 1935, it is evident that the scope of inquiry regarding the propriety of granting the remedy to the appellant at that time was fully equal to that of a review, in that the District Judge states that in his opinion, the fictitious character of the separate entity was admitted and that the facts presented to him did not justify a different conclusion than that arrived at by the Referee.

The extent of the finality of a turnover proceeding is discussed in *Page v. Arkansas Natural Gas Corp.*, 286 U. S. 269, 272, 52 S. Ct. 507 (76 L. Ed. 1096).

The case deals with the order of a referee in bankruptcy, ordering the execution of a conveyance. The order of the referee was affirmed by the District Court. The Court before whom the cause was pending prior to its review by the United States Supreme Court held that the referee had the power to make the order, particularly because the person affected thereunder submitted to the jurisdiction of the referee; in the proceeding resulting in the appeal, it was sought to relitigate the issues which resulted in the order of the referee ordering the execution of the conveyance. The Supreme Court, on page 272, says:

> "The order of the referee, in the bankruptcy proceeding, affirmed by the District Court, therefore ad-

judicated those issues between the parties and they may not be relitigated in the present suit by their successors in interest."

Chief Justice Taft considered the nature of a turnover order in the course of a contempt proceeding, where, of course, any attack was considered with even greater latitude than that permitted in a civil proceeding, and states as follows:

"The charge upon which the order is asked is that the bankrupt, having possession of property which he knew should have been delivered by him to the trustees, refuses to comply with his obligation in this regard. It is a charge equivalent to one of fraud and must be established by the same kind of evidence required in a case of fraud in a court of equity. A mere preponderance of evidence in such a case is not enough. (363) The proceeding is one in which coercive methods by imprisonment are probable and are foreshadowed. The referee and the court, in passing on the issue under such a turnover motion, should, therefore, require clear evidence of the justice of such an order before it is made. Being made, it should be given weight in the future proceedings as one that may not be collaterally attacked by an effort to try over the issue already heard and decided at the turnover. Thereafter on the motion for commitment the only evidence that can be considered is the evidence of something that has happened since the turnover order was made, showing that since that time there has newly arisen an inability on the part of the bankrupt to comply with the turnover order.

"The proceedings in these two cases have been so long drawn out by efforts on the part of the bankrupts to retry the issue presented on the motion to

> turnover as to be, of themselves, convincing argument that if the bankruptcy statute is not to be frittered away in constant delays and failures of enforcement of lawful orders, the rule we have laid down is the proper one. * * *
>
> "The conclusive effect in a proceeding of this sort of an order of 'turnover' finds its analogy in the inquiry in contempt proceedings for violating an injunction issued by a court of general jurisdiction. Howat v. Kansas, 258 U. S. 181, 66 L. Ed. 550, 42 Sup. Ct. Rep. 277; * * *."
>
> *Oriel v. Russell,* 278 U. S. 358, 73 L. Ed. 419, (pages 424, 425), 49 Sup. Ct. Rep. 173.

The appellant in the course of his discussion seems to be of the opinion that something can be gained from the recitals of the certificate of compliance of September 23, 1935. This certificate of compliance has been issued apparently in pursuance to the rule of Court; we know of no provision of the Bankruptcy Act requiring it. The benefit thereof, then, that inured to the bankrupt was that his petition for discharge could be filed and considered by the Court. Whether the District Court did have the inherent rule-making power to deny the bankrupt here the right to be heard upon a petition for discharge without a certificate is not involved here. His right to have his petition heard was not in anywise impeded nor does it add anything to the position of the bankrupt, as the order of February 4, 1935, had become final long before the end of September, 1935, and the Referee has no power left over it, whether *ex parte* or otherwise.

This Circuit Court has expressed itself heretofore as to Referee's right over orders.

Re Faerstein, 58 Fed. (2d) 942;

Patents Process v. Durst, 69 Fed. (2d) 283;

the *Faerstein* case also embodying a turnover order.

2. Objections of the Appellee Creditors Have Been Filed in Pursuance to General Order No. XXXII.

The reason for the amendment to General Order No. XXXII, particularly and pertinently, is discussed in the case of *Lerner v. First Wisconsin Nat. Bank,* 294 U. S. 116, 55 S. Ct. 360, 79 L. Ed. 796, from which we take occasion to quote below.

In the case at bar, the appearances of the objecting creditors and the objections to the discharge were all filed the same day. The rule specifically states that they must be filed the day fixed for the hearing of the petition for discharge. The two sets of objections were referred to the same Special Master for hearing and it is apparent from the record brought up by the appellant herein that, when the first appearance and objection were filed, reference was had to a Special Master, thus indicating that the Court was not going to hear the objection on said day. When the second appearance and objection were filed, they were referred to the same Special Master the same day, and subsequently heard at the same time as the first objection in point of filing. Wherein any damage or detriment has been suffered by the appellant is not apparent.

It is also proper to note, in considering the plaint of the appellant, that issue relative to the filing of the appearances and objections first arises on appeal, and that appellant went to trial and had a hearing and trial before the Special Master, made exceptions to the Special Master's report, which was confirmed, and only now asserts noncompliance with General Order No. XXXII.

The pertinent portion of *Lerner v. First Wisconsin Nat. Bank,* is as follows (p. 798):

> "The language of the amended order is mandatory; it is controlling in circumstances like those here presented; strict compliance should be accorded. Under Order XXXVII, and permissive provisions of the Bankruptcy Act, we think the courts may exercise discretion sufficient for the successful conduct of proceedings in varying circumstances. Thus, while an objecting creditor must file specifications showing the grounds of his opposition on the day when creditors are required to show cause, that day may be fixed or postponed by the court in view of the existing situation."

It clearly indicates that it was proper for the court to arrange its business in the manner before us.

Remington on Bankruptcy, Vol. 7, paragraph 3383, discusses the pertinent situation that, where the bankrupt goes to trial on the merits without objection, waiver of any defects in specifications would result.

3. The Order of February 4, 1935, Establishes the Presence of One of the Grounds Specified by Section 14 of the Bankruptcy Act Under Which the Discharge Must Be Denied.

Section 14 (b), subdivision 4, of the Bankruptcy Act, one of the grounds barring discharge, reads as follows:

> "(4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed or permitted to be removed, destroyed, or concealed any of his property, with intent to hinder, delay, or defraud his creditors;"

But a slight comparison will disclose the presence of each one of these elements in the findings and order of February 4, 1935; in fact, the requisite elements could not be set up with any greater clarity and conformance than evidenced by the turnover order. The nature of concealment is evident—there is no escape therefrom—and forms an occurrence which the act clearly prohibits, and to the perpetrators of which it directs the denial of a discharge.

4. Prior Determination of Concealment Is Conclusive in All Subsequent Proceedings.

Appellant, further, is precluded in this appeal because it has been repeatedly held that determination in the course of the bankruptcy proceedings that the bankrupt has concealed property from his trustee is a conclusive bar to his discharge.

Sawyer v. Orlov, 15 Fed. (2d) 952;

In re Breiner, 129 Fed. 155;

In re Sussman, 190 Fed. 111;
Grafton v. Mecklehan, 246 Fed. 737;
In re Craill, 196 Fed. 402;
In re Arnold, 1 Fed. Supp. 499.

The case of *Sawyer v. Orlov,* 15 Fed. (2d) 952, deals with an appeal by an objecting creditor from an order of Court granting a discharge. There a creditor objected to the discharge and in his specifications stated that, within four months of the bankruptcy the bankrupt transferred to a corporation, organized by him and owned by him substantially, all of his merchandise with the intent to hinder, delay and defraud.

The referee, in his report on the petition for discharge, stated that the question had been previously presented to him, the same objection was made to the composition, and at that time he (the referee) found that the transfer had been made and that it was for the purpose of hindering, delaying and defrauding the creditors.

The District Court entered a decree denying the petition for composition. The referee, in his report upon the objections to the discharge, reported further that, subsequent to the denial of the composition, a suit was brought in the District Court by the trustee to set aside the same transcript in which it was found that the bankrupt did not act with conscious fraudulent intent in making the transfer and thereupon the referee further stated that, in deference to the conclusion of the District Court, although

it was opposed to his own decision previously rendered, he recommended the discharge. The District Court ordered the discharge; the objecting creditor appealed.

In the assignment of errors, the appellant assigned as errors the consideration of the decree in the other suit (that is, the suit concerned with the setting aside of the transcript), and in not holding that the decree affirming the referee's report was a final adjudication of the question of fraud involved. The Court, in decreeing a reversal of the decree of the District Court, states as to these assignments:

> "(1) The first assignment must be sustained. It was wholly irregular for the referee to take into consideration the finding of the District Court in another suit between different parties.
>
> "(2) The second assignment likewise must be sustained. The finding of the referee in the composition proceeding, that the bankrupt made the transfer to the corporation with the 'deliberate intent to defraud his creditors,' affirmed by the decree denying composition, was a conclusive determination of these facts as between these parties when called in question in the subsequent proceeding for discharge to which they were likewise parties. Sutton v. Wentworth, 247 F. 493, 501, 160 C. C. A. 3; Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195; Southern Pacific Railroad v. United States, 168 U. S. 1, 57, 59, 60, 18 S. Ct. 18, 42 L. Ed. 355."

Sawyer v. Orlov, 15 Fed. (2d) 952.

5. It Was Within the Inherent Power of the Court to Take Judicial Notice of the Existence of the Order of February 4, 1935.

In view of the fact that the proceedings culminating in the denial of discharge to the bankrupt are predicated upon the turnover order above referred to, it becomes evident that the order was a part of the case before the Referee and was also a part of the case before the District Judge and, on December 2, 1935, this order occupied the position of being a final order and, being an order of the type which "was a prior determination of concealment" was conclusive in all subsequent proceedings. The usual requisite of judicial notice which we must impute to the Court in all stages of the proceedings would under the aforesaid authority preclude the discharge of the bankrupt without any further action on the part of any creditor and the objections of the opposing creditors were, so to say, but a suggestion of the Court of the existence of the record.

A somewhat analogous situation was considered by the United States Supreme Court in the case of *Freshman v. Atkins,* 269 U. S. 121 (46 Sup. Ct. Rep. 41), 70 L. ed. 193. There no appearance at all was made for the respondent on appeal. The bankrupt, in the course of this proceeding, applied for a discharge; the Referee reported to the Court adversely. After a lapse of years, the bankrupt instituted a new proceeding in bankruptcy and again petitioned for discharge and the Court took judicial notice of the prior and separate proceeding, and the Court, speaking of the matter, in the course of its opinion states as follows:

> "In such a situation the court may well act of its own motion to suppress an attempt to overreach the

due and orderly administration of justice. What is said in the Fiegenbaum case, 57 C. C. A. 409, 121 Fed. 70, is appropriate here: 'Not only should the court of bankruptcy protect the creditors from an attempt to retry an issue already tried and determined between the same parties, but the court, for its own protection, should arrest, *in limine,* so flagrant an attempt to circumvent its decrees.' There is nothing in Bluthenthal v. Jones, 208 U. S. 64, 52 L. ed. 390, 28 Sup. Ct. Rep. 192, to the contrary."

It is true that the opinion apparently concedes, for the purpose of argument, that such action by the Court should not be taken *"ex mero motu",* but apparently this language appertains to the fact that, in that case, there were two separate proceedings, and it is our understanding of the rule of judicial notice that it appertains solely to the case at bar.

In the instant proceeding, of course, the turnover order appertained to the same file which was before the District Judge on December 2, 1935, and, therefore, falls so peculiarly within that class of judicial notice which is so well described in *23 Corpus Juris,* pages 110 and 111:

"(1918) bb. In Same Case. In a case on trial in any court its records are actually or constructively before the judge. He will therefore take judicial notice of them and the facts which they establish, as in dealing with pleas in abatement, motions to dismiss, or for a new trial based upon defects in the record, including facts as to the action of the court, or of the judge on a former hearing, and what such records show regarding the proceedings of commissioners which are under review."

6. **Findings of a Special Master or Referee Approved by the District Court Are Conclusive of the Question of Fact and Will Not Be Disturbed Except in Case of Gross Error.**

The facts here disclose a reference, a hearing upon the objections of the opposing creditors, a report of the Special Master, and the concurrence in the report of the Special Master by the District Court after hearing upon objections made by the appellant to the report of the Special Master.

It, thus, is apparent that the cause falls within that class of cases wherein this Circuit Court has expressed itself in the case of *Ott v. Thurston,* 76 Fed. (2d) 368, quoting from O'Brien's Manual of Federal Appellate Procedure. Mr. O'Brien, in his book, quotes the following (pages 72 and 73):

> "The Court of Appeals for the Ninth Circuit quotes with approval the language of Remington on Bankruptcy, footnote to Sec. 3871, 4th Ed., Vol. 8, p. 227:
>
> 'And it is especially true that the reviewing courts will not disturb findings of fact except for manifest error, where both the referee and the district judge have coincided.'
>
> And the findings of a chancellor, based on testimony taken in open court, are presumptively correct and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact."

This rule has been followed by this Circuit Court in the following cases:

Neece v. Durst, etc. (C. C. A. 9), 61 F. (2d) 591;

Woods v. Naimy (C. C. A. 9), 69 F. (2d) 892, 895;

Swift, etc. v. Higgins, etc. (C. C. A. 9), 72 F. (2d) 791;

Exchange Nat. Bank of Spokane v. Meikle, (C. C. A. 9), 61 F. (2d) 176, 179;

and in one of the cases above (i. e., *Exchange Nat. Bank of Spokane v. Meikle, supra*), this Court has said:

> "The record shows that the testimony was all taken in open court. As this court has previously said in two cases: 'On the foregoing facts, the appellant is confronted by two well-established principles of law, from which there is little or no dissent: First, the findings of the chancellor, based on testimony taken in open court, are presumptively correct, and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact . . .' Easton v. Brant, 19 Fed. (2d) 857, 859; Gila Wat. Co. v. Int. Fin. Corp., 13 Fed. (2d) 1, 2."

Conclusion.

From the foregoing presentation of authorities, it is evident that the turnover order of February 4, 1935, concurred in to the extent stated in the opinion of the District Judge, did become a final order, and no appeal has been taken therefrom; that the certificate of the Referee under date of September 23, 1935, could not in any wise affect an order which had become final a long time prior thereto; this apparent disregard of every prerequisite of judicial notice, however, permitted the bankrupt to present his petition for discharge to the District Court. The objections were properly made by the objecting creditors; a just hearing was had thereon, as indicated by the records of the case, and the opinion of the Special Master has been fully concurred in by the District Judge. Aside from the presumptions therefrom arising, it would be a grave and most flagrant disregard of any precept of lawful determination of cases and the requirements of the Bankruptcy Act if, in view of the adjudication and the acts indulged in by the bankrupt as disclosed, the order of February 4, 1935, could be disregarded.

It is respectfully urged that the appeal herein be denied and that the order of the District Court be affirmed.

Respectfully submitted,

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Attorney for Appellees.